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No. 86-1656

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UTAH POWER & LIGHT COMPANY,
Appellant

v.

IDAHO PUBLIC UTILITIES COMMISSION,
UNITED STATES DEPARTMENT OF ENERGY, and
IDAHO POWER COMPANY,
Appellees

On Appeal from the Supreme Court of Idaho

APPELLANT'S REPLY TO THE MOTIONS TO DISMISS OF THE DEPARTMENT OF ENERGY, THE IDAHO PUBLIC UTILITIES COMMISSION, AND IDAHO POWER COMPANY

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TABLE OF CONTENTS

	Page
REPLY TO MOTIONS TO DISMISS	1
A. The IPUC Order is a "Statute" for Purposes of 28 U.S.C. § 1257(2)	1
B. Appellant Has Properly Raised Substantial Federal Questions	5
C. The Idaho Power Certificate Has Been Interpreted to Deprive Appellant of Its Property Without Due Process	6
D. Appellees' Certiorari Arguments are Meritless	9

TABLE OF AUTHORITIES

Cases: Page

Atchison, Topeka & Santa Fe Railway Co. v. Public Utilities Commission, 346 U.S. 359 (1953) 3
Cambridge Telephone Co. v. Pine Telephone, 712 P.2d 576 (Idaho 1985) 2
Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 (1975) 5, 6
Eddings v. Oklahoma, 455 U.S. 104 (1982) 5
Grand Trunk Western Railway Company v. Railroad Commission of Indiana, 221 U.S. 400 (1911) 4
Grindstone Butte Mutual Canal Co. v. Idaho Power Co., 574 P.2d 902 (Idaho 1978) 7
Idaho Underground Water Users Association v. Idaho Power Company, 404 P.2d 859 (Idaho 1965) 5
King Manufacturing Company v. City Council of Augusta, 277 U.S. 100 (1928) 1
Lake Erie & Western Railroad Co. v. Public Utilities Commission, 249 U.S. 422 (1919) 3, 4, 5
Lathrop v. Donohue, 367 U.S. 1191 (1961) 1
Live Oak Water Users' Association v. Railroad Commission of the State of California, 269 U.S. 354 (1926) 5, 6
McFayden v. Public Utilities Consolidated Corporation, 299 P. 671 (Idaho 1931) 6
Prentis v. Atlantic Coastline Co., 211 U.S. 210 (1908) 1, 2, 3
Securities and Exchange Commission v. Chenery Corporation, 332 U.S. 194 (1947) 3
State Public Utilities Comm. v. Lake Erie & W.R. Co., 115 N.E. 519 (1917) 4
Wadley Southern Railway Company v. Georgia, 235 U.S. 651 (1915) 4
Webb v. Webb, 451 U.S. 493 (1981) 5
Williams v. Bruffy, 96 U.S. 176 (1878) 3

Statutes and Rules:

United States Code, Title 28, Section 1257(2) 1, 4, 6
United States Code, Title 28, Section 1257(3) 9

TABLE OF AUTHORITIES—Continued

Page

Rules of the Supreme Court of the United States, 16.1(b) ---------- 5

Rules of the Supreme Court of the United States, 17.1(b) ---------- 9

Miscellaneous:

2 K. Davis *Administrative Law Treatise,* § 7:25 (2d ed. 1979) ---------- 3

APPELLANT'S REPLY TO THE MOTIONS TO DISMISS OF THE DEPARTMENT OF ENERGY, THE IDAHO PUBLIC UTILITIES COMMISSION, AND IDAHO POWER COMPANY

Appellant Utah Power & Light Company ("Utah Power") hereby replies to the Motions to Dismiss of appellees Department of Energy (the "DOE"), Idaho Power Company ("Idaho Power"), and Idaho Public Utilities Commission (the "IPUC").

A. The IPUC Order is a "Statute" for Purposes of 28 U.S.C. § 1257(2).

The DOE and IPUC contend that the IPUC's order (the "Order") is not a "statute" under 28 U.S.C. § 1257 (2) because it is not legislative in nature. Said appellees rely upon several cases standing for the proposition that a "statute" for purposes of 28 U.S.C. § 1257(2) must be legislative in nature: *Lathrop v. Donohue*, 367 U.S. 1191 (1961), *King Manufacturing Co. v. City Council of Augusta*, 277 U.S. 100 (1928), and *Prentis v. Atlantic Coastline Co.*, 211 U.S. 210 (1908).

In *Prentis*, this Court held that an act is judicial in nature when there is an investigation, declaration, and enforcement of "liabilities as they stand on present or past facts, and under laws supposed already to exist." *Prentis*, 211 U.S. at 226. Legislation, however, "looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." *Id.* The DOE and IPUC claim that the Order merely declares rights "according to the terms of previously issued certificates [of public convenience and necessity ("Certificate")]" and therefore is not a statute. This analysis is faulty in at least three respects.

First, the Order is more than a mere declaration of rights. It changes previously established rules regarding competition between public utilities involving conflicting Certificates in a manner affecting all future con-

flicts between public utilities. It also extends the rule of *Cambridge Telephone v. Pine Telephone*, 712 P.2d 576 (Idaho 1985), in a way which creates a conflict with decisions of other state courts. *See* J.S., at 16-19.

Second, the Order fits squarely within the *Prentis* legislative test because it "looks to the future and changes existing conditions." *Prentis*, 211 U.S. at 226. The DOE sought a declaratory ruling from the IPUC that Idaho Power had the right *solely* to serve DOE at its Idaho facility. Until issuance of the Order, the DOE continued to receive electricity as it had for the preceding thirty-five years, pursuant to the Three Party Agreement (the "Agreement"). Under the Agreement, Idaho Power electricity was delivered to the DOE over Utah Power facilities and *pursuant to Utah Power's Butte County Certificate.* See J.S., at 5. Until 1969, Utah Power held the sole Butte County Certificate, the point of delivery for power to the DOE facility. Even after Idaho Power received its Certificate in 1969, the DOE continued to receive power through Utah Power's physical facilities and under the Agreement, *pursuant to Utah Power's Butte County Certificate.* There was no change whatsoever in the operation or plan of delivery. The effect of the Order was to change the existing condition under which Idaho Power furnished the DOE with electricity through Utah Power's Certificate and the Agreement.

Finally, appellees' analyses presuppose the validity of the Idaho Power Certificate, which Utah Power challenges. *See infra*, at 6-9. If the Idaho Power Certificate is invalid, the Order is nothing more than a defective grant of authority, in effect, a new Certificate granted without compliance with Idaho statutory requirements for obtaining such Certificate. The IPUC concedes that such an original grant is a legislative act. *See* IPUC Motion to Dismiss, at 4. It follows that a change in an original grant is likewise a legislative act.

The DOE and IPUC incorrectly argue that, because this matter began as a declaratory proceeding and re-

sulted in an order purportedly resolving issues between the parties to this appeal, the Order cannot be legislative.[1] It is elementary law that an administrative order resulting from an adjudicatory or declaratory proceeding can and often does result in the fashioning of a rule. *See, e.g., Securities and Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 202-03 (1974); 2 K. Davis *Administrative Law Treatise*, § 7:25 (2d ed. 1979).

None of the cases cited by appellant, *Atchison, Topeka & Santa Fe Railway Co. v. Public Utilities Comm'n*, 346 U.S. 359 (1953), *Lake Erie & Western Railroad Co. v. Railroad Comm'n of Indiana*, 249 U.S. 422, 424 (1919), or *Williams v. Bruffy*, 96 U.S. 176, 183 (1878), involved the quintessential legislative-type order—the ratemaking order—such as was considered in *Prentis*. Significantly, however, this Court upheld appellate jurisdiction in each case. Furthermore, both *Atchison* and *Lake Erie* were decided after *Prentis*.

In *Atchison*, the California Public Utilities Commission (the "CPUC") "entered orders authorizing the construction of certain [railroad crossing] grade separation improvements and allocating the costs therefor, pursuant to [statute]," between the subject railroads and the city in which the improvements would be constructed. *Atchison*, 346 U.S. at 347-49. It is clear from the opinion that the CPUC was exercising previously established authority in reaction to an *existing* automobile traffic safety problem, which the order was intended to resolve. Hence, from a jurisdictional perspective, *Atchison* does not differ materially from the matter at hand.

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[1] On page 8 of the DOE Motion to Dismiss, the DOE states that *both* the majority and dissenting opinions "note" that "'[t]his is not the ordinary public utilities case,' but instead resembles a 'contract dispute.'" The statement, however, is properly attributable only to the dissenting opinion, and is taken out of context. Justice Bakes stated that "the majority's decision *could be likened* to settling a . . . contract dispute. However, it is evident that the majority has failed to (1) realize the broader constitutional implications of this case." J.S., at 14a (emphasis added).

Lake Erie concerned the validity of an order of the Illinois Public Utilities Commission (the "Illinois PUC") directing a railroad company to reconstruct a railway spur, which had been used for forty years but was torn up by the railroad company when its user had suffered a fire, which temporarily put the user out of business. The railroad company refused to reconstruct the spur, as it was required to do by statute, claiming a statutory exception that it posed a hazard to its main-line operation. The Illinois Supreme Court stated that the primary issue was whether the railroad company had "improperly removed" the track. *State Public Utilities Comm'n v. Lake Erie & W.R. Co.*, 115 N.E. 519, 522 (1917). Thus, under the rationale of the DOE and the IPUC, the Illinois PUC's order could have been construed merely as a declaration of the railroad company's rights under the statute and hence judicial in nature.

This Court, however, described the *Lake Erie* order in the following manner, in upholding jurisdiction under 28 U.S.C. § 1257(2):

> Such an order, being legislative in its nature and made by an instrumentality of the State, is a state law within the meaning of the Constitution of the United States and the laws of Congress regulating our jurisdiction.

Lake Erie, 249 U.S. at 424; *see also Grand Trunk Western Railway Co. v. Railroad Comm'n of Indiana*, 221 U.S. 400 (1911) (this Court held that the order of the state railroad commission directing apportionment of costs to construct a railway crossing "is a legislative act by an instrumentality of the State exercising delegated authority," *id.* at 403); *Wadley Southern Railway Co. v. Georgia*, 235 U.S. 651 (1915) ("administrative orders made by a commission are . . . legislative in nature," *id.* at 660). Just as in *Lake Erie*, the IPUC in this matter reviewed the history of service to the DOE, and relying thereon, and upon a Certificate previously issued to Idaho Power, ordered that Idaho Power was entitled solely to

serve the DOE. From a jurisdictional standpoint, there is no difference between the present case and *Lake Erie.*

B. Appellant Has Properly Raised Substantial Federal Questions.

Utah Power asserted its federal questions in its petition for rehearing to the Idaho Supreme Court. The petition was denied "after due consideration." J.S., at 26a. This Court has previously held that a federal question is properly raised when first broached in a petition for rehearing to the highest court in the state. *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 476 (1975).[2]

In addition, Justice Bakes' dissent clearly discussed appellant's federal claims, and this Court has intimated that consideration of federal questions in a dissenting opinion will satisfy Supreme Court Rule 16.1(b) jurisdictional requirements. *See Webb v. Webb,* 451 U.S. 493, 495 (1981).

In its Motion to Dismiss, p. 9, the DOE suggests that, because the majority opinion did not directly discuss appellant's federal questions, appellant did not properly preserve these claims for review by the Idaho Supreme Court. However, appellant properly preserved its federal claims for Idaho Supreme Court review by raising them in its petition for rehearing to the IPUC. *See Idaho Underground Water Users Ass'n v. Idaho Power Co.,* 404 P.2d 859 (Idaho 1965); J.S., at 9-10, 67a.

The DOE's reliance on *Live Oak Water Users' Ass'n v. Railroad Comm'n of the State of California,* 269 U.S. 354 (1926), cited by the DOE at p. 9 of its Motion to Dismiss, is misplaced. Unlike the appellant in *Live Oak,* in both its appellate and rehearing petition briefs to the Idaho Supreme Court, as well as in oral argument, Utah Power raised its federal constitutional claims. J.S., at

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[2] In *Eddings v. Oklahoma,* 455 U.S. 104, 113 n.9 (1982), this Court also noted that a federal question may be properly raised in a petition for rehearing where the petitioned court denies the petition being "fully advised in the premises."

9-10, 68a-71a. It is also undisputed that the majority opinion expressly passed on appellant's federal claims by rejecting the position asserted in the dissenting opinion. J.S., at 10a n.1. Such summary rejection satisfies § 1257 "drawn into question" requirements. *Cox*, 420 U.S. 469, 476 (1975). Hence, it cannot be *reasonably* disputed that appellant's constitutional claims were presented to the Idaho Supreme Court "with sufficient definiteness . . . to say that the court's attention was challenged thereto." *Live Oak*, 269 U.S. at 357.

C. The Idaho Power Certificate Has Been Interpreted to Deprive Appellant of Its Property Without Due Process.

The substantive position asserted by the DOE and Idaho Power for dismissal of this appeal is that there are adequate state grounds to support the decision of the Idaho Supreme Court [3] and that the state court has final authority to interpret the scope of state-issued Certifi-

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[3] Although appellees' substantive arguments are without impact on the determination of the Court's jurisdiction in this matter, inasmuch as they ignore the constitutional problems of denial of due process, such arguments also fail on their merits. In *McFayden v. Public Utilities Consolidated Corp.*, 299 P. 671 (Idaho 1931), the Idaho Supreme Court stated:

> As between two utilities with like ability to furnish like service under our public utility law, the company already serving a given field has a right to preference. . . . It is the purpose of our law to protect that right by the requirement that a newcomer, before entering the field, shall procure a certificate of convenience and necessity to construct and operate a utility in competition. If the new service offered has no advantage over the old from the public viewpoint, other than mere competition under similar basic costs, then the convenience and necessity for it, under the public utility law, would be wanting, and the utility in the field would be entitled to protection against duplication and unwarranted competition.

299 P. at 673. Utah Power held the first Certificate for Butte County and had allowed Idaho Power to provide service pursuant to this Certificate under the Three Party Agreement. Its ability to provide satisfactory service is not disputed.

cates.[4] However, this argument presupposes the validity of the Idaho Power Certificate, which Utah Power challenges on federal constitutional grounds.

The DOE asserts that notice generated by Idaho Power's application (the "Application") for a certificate of authority to construct the AMPS line was all the notice constitutionally required to validate Idaho Power's Butte County Certificate, vis-à-vis appellant, as authority to solely serve the DOE. DOE Motion to Dismiss, at 12-13 n.9. The DOE asserts, without supporting authority, that such notice is "undisputably" satisfactory. The constitutional adequacy of notice for a Certificate to *construct* a power line, interpreted sixteen years later to grant authority to *sell* electricity, is anything but undisputable.

As set forth in *Grindstone Butte Mutual Canal Co. v. Idaho Power Co.*, 574 P.2d 902, 907 (Idaho 1978), "[a]ppurtenant to the right to notice is the right to be fairly notified as to *the issues* to be considered . . . ." *Id.* at 907 (emphasis added). In substance, the Application, set out in Appendix J, J.S., at 76a-81a, gave the following notice: Idaho Power, as part of its contractual responsibilities associated with the AMPS-line project, was to construct a section of the line through Butte County. Having *no* Butte County Certificate, Idaho Power requested the IPUC to grant it a Certificate for Butte County "FOR TRANSMISSION LINE ONLY," with the following limitation:

> That said transmission line . . . *will not be available for, or dedicated to, the furnishing of general*

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[4] As an "alternative basis" in support of its Motion to Dismiss, the DOE asserts that a reversal by this Court of the Idaho Supreme Court opinion would not affect the outcome of this case because the IPUC noted, but did not rely upon, that public interest was a factor weighing in favor of Idaho Power and the DOE. DOE Motion to Dismiss, at 13. This bootstrap analysis relies on nothing more than dicta in the Order, incorrectly assuming that public interest is relevant in determining whether Utah Power was denied due process of law.

> *service along its route, and the construction of this transmission line will not compete with any other public utility, corporation or person.*

Id. at 78a (emphasis added).

It is clear from the foregoing that the notice received by Utah Power was a request by Idaho Power to *construct* a transmission line. Nothing suggests that Idaho Power was requesting authority to *sell* electricity. As noted in the Jurisdictional Statement, pp. 20-21, the infirmities relating to the Idaho Power Certificate are substantial, both in terms of notice and compliance with statutory requisites.

The DOE's assertion that appellant has not suffered a constitutional deprivation because it has not shown that it has an *exclusive* right to service Butte County, and because it still holds a valid Certificate to serve therein, DOE Motion to Dismiss, at 11, ignores the constitutional questions. There is no dispute that providing electric services to the DOE is a valuable property right. Furthermore, exclusivity is an inherent right under Idaho law. As noted in the Jurisdictional Statement, p. 20, the IPUC could not issue a competing Certificate to Idaho Power without proving unsatisfactory service by Utah Power. This is not disputed. It logically follows that a Certificate is exclusive to the extent the Certificate holder provides satisfactory service. It has never been found, nor even suggested, that Utah Power provides anything but satisfactory service.[5] The result of

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[5] Even assuming that Utah Power's Certificate was not exclusive, the DOE's conclusion that the IPUC was therefore authorized to issue overlapping Certificates is without logic or legal support. As stated by the DOE, "Appellant has failed to show that Idaho law limited the [IPUC's] authority to issue another certificate." DOE Motion to Dismiss, at 12. This assertion demonstrates a fundamental misunderstanding of appellant's constitutional claims. Mere authority to act does not shield otherwise lawful actions from constitutional scrutiny. For example, most governmental entities have inherent or statutory authority to take private property for

the IPUC Order, granting Idaho Power the right solely to serve the DOE, deprives Utah Power of this valuable right.[6] The issue raised on appeal to this Court is whether Utah Power was deprived of this property right in contravention of the United States Constitution.

D. Appellees' Certiorari Arguments are Meritless.

In addition to setting forth the basis for appellate jurisdiction, appellant has also raised facts in the Jurisdictional Statement which establish certiorari jurisdiction for this matter in the Court on at least two bases.

First, as demonstrated above, "the validity of a state statute is drawn in question on the ground of its being repugnant to the constitution." 28 U.S.C. § 1257(3). Second, appellant has claimed an infringement of constitutionally protected right, title, and privilege.

Appellant has also suggested reasons justifying the exercise by this Court of its discretionary review pursuant to its certiorari jurisdiction. As demonstrated in the Jurisdictional Statement, pp. 16-18, the Idaho Supreme Court decision herein under review "has decided a federal question [constitutionally protected property rights] in a way in conflict with the decision of another state court of last resort." Supreme Court Rule 17.1(b).

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public purposes by way of condemnation. Although condemnation is fully authorized, the exercise of that authority is subject to constitutional scrutiny, for example, payment of just compensation.

[6] The DOE's assertion that "appellant may not have suffered an 'interference with reasonable investment-backed expectations,'" DOE Motion to Dismiss, at 13 n.9, is without foundation. It is undisputed that Utah Power constructed substantial transmission and substation facilities, in addition to providing electricity as well as standby capacity, to meet the energy needs of the DOE Idaho facility, and that appellant received annual compensation therefor. The result of the IPUC Order clearly and completely interferes with appellant's "reasonable investment-backed expectations," eliminating the economic return associated with its facilities and services.

In addition to conflicting state court decisions, appellant sets out national implications flowing from the Idaho Supreme Court opinion. J.S., at 10-14. No attempt is made by appellees to refute either the conflicting authority or the implications of the decision here under review. Certiorari jurisdiction in this matter is proper and exercise thereof warranted for reasons set forth in the Jurisdictional Statement and this Reply.

DATED this 22nd day of September, 1987.

Respectfully submitted,

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